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IN THE

Supreme Court of the United States

WISCONSIN CENTRAL, LTD.;
GRAND TRUNK WESTERN RAILROAD COMPANY; AND
ILLINOIS CENTRAL RAILROAD COMPANY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads, many smaller freight railroads, Amtrak, and some commuter authorities.[1] AAR's members operate approximately 83 percent of the rail industry's line haul mileage, produce 97 percent of its freight revenues, and employ 95 percent of rail employees. In matters of industry-wide significance, AAR frequently appears on behalf of the railroad industry before Congress, administrative agencies, and the courts.

This case, which raises the question whether stock received by railroad employees is subject to payroll taxes levied under the Railroad Retirement Tax Act (RRTA), 26 U.S.C. §§3201-3241, presents such a matter of industry-wide significance. Taxes represent the third largest expense for railroads, surpassed only by wages and fuel. In 2016, the railroad industry paid approximately $12 billion in taxes, which included nearly $2.5 billion in payroll taxes. Ass'n. of Am. R.R., *Railroad Facts* 16 (2017 ed.). AAR routinely represents the railroad industry in tax-related matters before the courts and regulatory bodies, such as the Internal Revenue Service and the Railroad Retirement Board. AAR has filed *amicus* briefs with appellate courts and this Court in a number of important tax cases affecting

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[1] As required by Rule 37.2(a), counsel for *amicus curiae* AAR has timely notified the parties of AAR's intent to file this brief. Both parties have consented to AAR's filing of an *amicus* brief. Pursuant to Rule 37.6, AAR states that no person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

the railroad industry (*e.g.*, *CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277 (2011); *BNSF Ry. Co. v. United States*,745 F.3d 774 (5th Cir. 2014) (in support of petition for rehearing)).

Here, the Court of Appeals issued an expansive interpretation of the term "compensation" under the RRTA which cannot be squared with the text, purpose, or history of the Act. The Court held that almost anything with market value is a "form of money remuneration," and thus subject to payroll tax. Not only does this decision impose a significant tax on non-money remuneration that Congress plainly did not intend to tax, it is in direct conflict with a decision of another court of appeals on the same issue. The conflict created by these decisions means that railroads, and their employees, in different parts of the country are subject to different rules with regard to their obligations to pay taxes under the RRTA. That different tax treatment will continue until this Court resolves the conflict.

Thus, the question presented by this case has implications not just for Petitioners, the U.S. subsidiaries of Canadian National Railway Company, and their employees. It impacts all railroads in the United States that offer, have offered, or are contemplating offering, stock to some of their employees. Therefore, all of AAR's members have a direct and significant interest in having this conflict resolved so they will have clear and uniform guidance regarding their tax obligations.

SUMMARY OF THE ARGUMENT

The petition should be granted so this Court can resolve a split among federal courts of appeals over the question whether stock payments to employees constitute "compensation" under the RRTA. This split creates an untenable situation for the nation's railroads because it results in different tax treatment of different railroads (and their employees) that are located in different parts of the country. Until the circuit split is resolved, railroads will be subject to different rules that will make the tax cost of providing employees with stock—a valuable tool used by many railroads to reward and incentivize employees—greater for some railroads than it is for others. This tax cost variation also will apply to railroad employees—thousands of whom typically are eligible for these programs annually—who, like their employers, also must pay payroll taxes on the compensation they receive.

The courts of appeals' decisions reflect different interpretations of the same statutory language. The Internal Revenue Service interprets the term "compensation" in the RRTA the same way it interprets the term "wages" used in the Federal Insurance Contributions Act—the statute that funds Social Security benefits. However, these two statutes are worded differently; compensation in the RRTA is defined as "any form of money remuneration" while wages in FICA are defined as "all remuneration." The Fifth Circuit found the RRTA ambiguous and deferred to the IRS's interpretation. The Seventh and Eighth Circuits found the RRTA clear and declined to defer to the agency's interpretation—while coming to different conclusions about its meaning. The divergent rationales utilized by the three courts of appeals highlight the need for this Court's review of the question presented.

Creation of the railroad retirement system in the 1930s was neither the first, nor last, time Congress enacted railroad-specific legislation to address particular circumstances or characteristics of the railroad industry. Among other things, the railroad retirement system was designed to address a pension crisis facing the railroads. In doing so, Congress clearly made the choice to define the terms "compensation" and "wages" differently, using narrower language in the RRTA that conformed to the way railroad pensions were calculated at the time, and demonstrates an intent not to tax all forms of remuneration that a railroad employer could confer on an employee. This case provides an excellent opportunity for this Court to provide guidance on statutory construction, and in particular the need to give primacy to the specific words Congress chose to use in a railroad statute aimed at addressing an industry-specific situation.

ARGUMENT

1. The Conflict in the Courts of Appeals Creates Uncertainty and Leaves Railroads and Their Employees in Different Parts of the Country Subject to Different Rules Related to the Taxability of Stock Under the Railroad Retirement Tax Act.

This case involves the interpretation of a federal tax statute that applies to all railroads nationwide. Over the past few years, the statute has been interpreted differently by three federal courts of appeals. The Seventh Circuit has joined the Fifth in interpreting the RRTA to require the payment of millions of dollars in taxes by railroads and their employees when stock is received as remuneration by employees. In contrast, the Eighth Circuit has held that such tax payments are not required. The difference turns on the courts'

interpretations of the term "money remuneration" used in the definition of "compensation" under the RRTA. The split among the circuits means that some railroads (and their employees) must pay taxes on their employees' stock remuneration, while other railroads (and their employees) do not have to pay such taxes on the very same form of remuneration.

While money remuneration in the form of salaries and bonuses constitutes the core of a railroad employee's total compensation, other tools are used by railroad employers to reward and incentivize employees. One such tool is stock, which may be transferred to employees via nonqualified stock options (such as those involved in this case) and restricted stock (such as is involved in other cases, *e.g.*, *Union Pac. R.R. v. United States,* 865 F.3d 1045 (8th Cir. 2017)). Remuneration of this nature is deemed valuable as it gives employees a direct stake in the company's fortunes. Indeed, Congress has sought to encourage employee ownership of employer stock, which is seen as a "device for expanding the national capital base among employees—an effective merger of the roles of capitalist and worker." *Donavan v. Cunningham*, 716 F.2d 1455, 1458 (5th Cir. 1983). *See* Pet. at 8 for an explanation of the stock option program used by Canadian National's U.S. subsidiaries.

All the large railroads utilize or have utilized stock options similar to Canadian National's program at issue in this case. Significantly, the split among the circuits means the tax cost of providing stock to employees will be greater for some railroads than it will be for others, with the different tax treatment depending solely on where the company's headquarters is located.

This is an untenable situation for the nation's railroads. The railroad industry spans the entire nation. Each of the five largest railroads is headquartered in a different federal circuit, three in which the court of appeals has issued rulings on the question presented. Other large railroads are headquartered in circuits that have not ruled on this issue. However, a district court recently issued a decision on this issue which is now on appeal before the Court of Appeals for the Eleventh Circuit, where the headquarters of another major railroad is located. *CSX Corp. v. United States*, No. 3:15-cv-427 (M.D. Fla. May 2, 2017), *appeal docketed*, No. 17-12961 (11th Cir. June 30, 2017). If this Court does not resolve the issue and that appeal goes forward, regardless of how the Eleventh Circuit rules, a split among the circuits will remain.

The divergent decisions affect railroad employees as well as employers. Overall, railroads employ over 200,000 people in the United States, who are spread among all fifty states—from over twenty thousand in both Texas and Illinois to nine in Hawaii. *Railroad Facts* at 58. In recent years stock remuneration has involved several thousand employees and tens of millions of dollars in tax payments. As a result, some railroad employees are covered by one rule, others by a different rule, and for some, the law is unsettled. As with their employers, employees who work for some railroads will bear a larger tax burden when receiving stock than would similarly situated employees of other railroads.

As the petition points out, for Canadian National's subsidiaries—which together are considerably smaller than the four largest freight railroads in the United States—approximately $13 million in potential tax liability is implicated. Pet. at 20. On a national basis, this issue involves many tens of millions of dollars in

potential tax liability. As long as this issue remains unresolved, the nation's railroads will continue to be subject to divergent—indeed, opposite—rules related to these taxes. This lack of uniformity in the law, and the inequities among taxpayers it leads to, can only be eliminated by this Court.

The RRTA funds retirement and disability benefits that are available to railroad workers, their spouses and survivors, under the Railroad Retirement Act (RRA). 45 U.S.C. §§231–231v. To fund these benefits, the RRTA levies payroll taxes on the compensation paid by employers and received by employees. 26 U.S.C. §3221(a) & (b); 26 U.S.C. §3201(a) & (b). Not only have the courts of appeals reached different results about the taxability of stock under the RRTA, they have utilized different methods to interpret the plain language of the statute, and come to different conclusions about whether deference should be given to the administrative agency charged with enforcing the statute.

The Internal Revenue Service's regulation equates the term "compensation" used in the RRTA with the term "wages" used in the Federal Insurance Contributions Act (FICA), 26 U.S.C. §§3101 *et seq.*—the statute that funds Social Security benefits. FICA levies payroll taxes on "wages" which is defined as "*all remuneration* for employment, including the cash value of all remuneration (including benefits) paid in any medium other than cash." 26 U.S.C. §3121(a). (emphasis supplied) In contrast, the RRTA defines compensation as "any form of *money remuneration* paid to an individual for services rendered as an employee to one or more employers." 26 U.S.C. § 3231(e)(1) (emphasis supplied). Despite the very different language used in the statutes, the IRS has

concluded that in the RRTA "[t]he term compensation has the same meaning as the term wages in section 3121(a) [FICA] . . . except as specifically limited by the" RRTA. 26 C.F.R. §31.3231(e)-1.

The lower courts have taken different approaches to the IRS's interpretation. The Fifth Circuit found the statute ambiguous and, under *Chevron U.S.A. v. NRDC*, 467 U.S. 837 (1984), deferred to the agency's interpretation. *See BNSF Ry. Co. v. United States*, 775 F.3d 743, 755-56 (5th Cir. 2015).[2] The Seventh and Eighth Circuits found the statute clear and refused to defer to the agency's interpretation. Yet, while the Eighth Circuit held that stocks are not money remuneration, *see Union Pac.*, 865 F.3d at 1053, the Seventh Circuit in the decision below ruled for the IRS. Pet App. 1a–13a. The divergent rationales utilized by the three courts of appeals highlight the need for this Court's review of the question presented.

2. The Decision Below is at Odds With This Court's Repeated Rulings That Where Congress Treats Railroads Differently From Other Industries Courts Must Give Effect to Those Differences.

This case offers an opportunity for this Court to provide guidance on the construction of an important federal statute that is unique to the railroad industry. In response to the railroad industry's emergence as the dominant form of interstate commerce in the nineteenth century, and the industry's many unique characteristics, Congress has, on more than one occasion, enacted laws specifically aimed at railroads.

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[2] The district court in Florida also deferred to the IRS's broad interpretation of money remuneration, a ruling now on appeal. *CSX Corp.*

See R.R. Ret. Bd., *Railroad Retirement Handbook* 1 (2015) (available at https://www.rrb.gov/Sites/default/files/2017-04/RRB%20Handbook%20%282015%29.pdf.) (Prior to enactment of the RRA "[n]umerous laws pertaining to rail operations and safety had already been enacted" and "[s]ince passage of the [RRA], numerous other railroad laws have subsequently been enacted."). Congress also has enacted parallel statutes addressing the same subject matters in other industries, retirement security being but one example. Often, Congress has utilized different language in the railroad statutes because, as the result of deliberate policy choices, it intended to treat railroads differently from other industries. In fact, in the context of the Railway Labor Act and the National Labor Relations Act—statutes addressing labor relations in the railroad (and airline) industry and industry in general, respectively—this Court has admonished that "parallels . . . should be drawn with utmost care and with full awareness of the differences between the statutory schemes." *Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 578, n.11 (1971). Rather than heed that admonition, the lower court failed to give primacy to the words Congress chose to use in a railroad-specific statute, and instead interpreted it on the assumption that different words in different statutes mean the same thing. *See Burlington N. & Santa Fe Ry. v. White*, 548 U.S. 53, 62-63 (2006) (The use of different words, especially in similar statutes, is strong evidence that "Congress intended its different words to make a legal difference."). That approach to the RRTA is in direct conflict with this Court's instructions about how to approach railroad-specific statutes generally.

The railroad retirement system and Social Security system are similar in many respects, however, as a

result of deliberate choices made by Congress they differ significantly in others. The RRA provides two tiers of benefits, the first being essentially equivalent to those available to Social Security beneficiaries, but subject to railroad retirement age and service eligibility criteria, which in some circumstances are more generous.[3] Additionally, the RRA provides a second tier of benefits, based entirely on an employee's railroad earnings, which are not available to Social Security beneficiaries. For example, the RRA offers an occupational disability benefit to employees who are disabled from performing their regular occupation, a benefit that is not available to Social Security beneficiaries. 45 U.S.C. §231a(a)(1)(iv). The tier II benefits are supported by payroll taxes on railroads and their employees that are not levied on Social Security employers and employees.

As discussed above, another difference is the language used to define "compensation" (in the RRTA) and "wages" (in FICA). As the petition points out, these very different definitions were enacted in 1935 by the same Congress. *See* Pet. at 6. That same Congress chose to define wages under FICA far more broadly—and specifically to cover nonmonetary payments—than it defined compensation under RRTA. *Compare* 49 Stat. 620, 639 (1935) *with* 49 Stat. 968, 974 (1935) (and in the ensuing 80 years neither definition has been altered). And Congress had good reason to do so.

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[3] For example, railroad employees who have at least thirty years of creditable service can retire with a full pension benefit when they reach age sixty, 45 U.S.C. §231a (a)(1)(ii), while workers covered by the Social Security system are not eligible for an unreduced benefit until between the ages of 66 and 67. 42 U.S.C. §416(l).

As the petition explains, while the Railroad Retirement system and the Social Security system both emerged during the great depression of the 1930s, the circumstances they addressed differed. Pet. at 4. Unlike other industries, many railroads already offered pensions to their employees—the first originating in 1874—although the adequacy and financial stability of some were precarious, a situation that was exacerbated by the economic conditions during the 1930s. *Railroad Retirement Handbook,* at 1. Because the then-proposed Social Security system would not begin paying benefits immediately, and would provide no credit for service prior to 1937, it did not serve the needs of the many railroad pensioners and long-term employees who would have been left without benefits. Therefore, to address that crisis, the RRA created a new federalized railroad pension by mandating benefits financed by taxes. *Railroad Retirement Handbook,* at 1-2; *see Hisquierdo v. Hisquierdo*, 439 U.S. 572, 573-74 (1979).

A federal pension had never been established before, especially one designed to replace private pensions. During an era when *Lochner* jurisprudence still prevailed, Congress anticipated constitutional challenges and a Supreme Court that was skeptical of New Deal legislation. Indeed, the first railroad retirement act was challenged in court and held to be unconstitutional. *R.R. Ret. Bd. v. Alton R.R.*, 295 U.S. 330 (1935).[4] Nonetheless, the quest to strengthen the retirement income security of railroad workers persisted. Ultimately, negotiations between rail labor and management, urged by President Roosevelt, produced

[4] A new railroad retirement law was enacted in 1935. However, this laws too was held unconstitutional in part by a district court. *Alton R.R. v. R.R. Ret. Bd.*, 16 F.Supp. 955 (D.D.C. 1936).

a compromise enacted into law as the Railroad Retirement Act of 1937 and the Carrier Taxing Act of 1937. *Railroad Retirement Handbook*, at 2. To maximize the chances that these statutes would survive judicial review, Congress drafted them, as much as possible, to conform to the railroads' then-current private pensions.

These circumstances provide a logical explanation for the different language Congress used when drafting the railroad retirement statute and Social Security statute. Before enactment of the RRTA, railroad pension plans were typically funded based on an employee's base pay, base salary, or regular pay—*i.e.*, based on each employee's *money* remuneration. Railroad employees often received non-money benefits as well, such as food, lodging, and transportation, but the value of those benefits was not used to compute retirement pensions. MURRAY LATIMER, INDUS. PENSION SYSTEMS IN THE UNITED STATES AND CANADA 20-21, 30-31, 106-108 (1933 ed.). Additionally, many railroads offered employees stock-purchase plans, not dissimilar to the plans at issue here. Nat'l Indus. Conference Bd., *Studies in Industrial Relations: Employee Stock Purchase Plans* 18-22 (1928 ed.). These too were not included in the calculation of employee pension benefits. *See BNSF Ry.*, 775 F.3d at 755 ("[A]t the time the RRTA was enacted existing railroad pension plans were based on an employee's cash compensation only, rather than other, broader types of compensation, despite the fact that some railroad companies apparently offered stock-option benefits.") Thus, in devising a program to replace the ailing private railroad pension system, Congress utilized a similar funding method, under which benefits were calculated based only on monetary remuneration.

Congress clearly made the choice to define the terms "compensation" and "wages" differently, using narrower language in the RRTA that demonstrates an intent not to tax all forms of remuneration that a railroad employer could confer on an employee. Instead, as evidenced by the plain language used, Congress chose to limit such taxation to "any form of money remuneration." In reading the term "money remuneration" broadly—beyond, by its own admission, what was considered to be money at the time—the court below noted that doing so made "good practical sense" because it created proper incentives for the structuring of compensation packages. Pet. App. at 5a. Even if the court's point has some merit as a matter of policy, that is not a judgment that should play a role in a court's interpretation of statutory language when that language is clear.

CONCLUSION

For the foregoing reasons the petition should be granted.

Respectfully submitted,

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